

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

940

No. 21,087

Milton Martin,

Appellant,

v.

United States of America,

Appellee.

Appeal from the United States District Court
For the District of Columbia

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United States Court of Appeals
for the District of Columbia Circuit

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APPELLANT'S STATEMENT OF THE
QUESTION PRESENTED

The question is whether the Court below erred in denying appellant's motion for judgment of acquittal at the close of the Government's case where it failed to sufficiently identify appellant as a participant and where the circumstantial evidence introduced left doubt as to appellant's connection with the crime charged.

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70 Yale Law Journal 1151	11, 12
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*Cases chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,087

Milton Martin,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
For the District of Columbia

BRIEF FOR APPELLANT

Jurisdictional Statement

Appellant was convicted of the offense of robbery under Section 22-2901, D. C. Code, 1961 Edition, as amended.

Jurisdiction was conferred upon the Court below by Section 11-521, D. C. Code, 1961 Edition, as amended, and is conferred upon this Court by Section 1291, Title 28, United States Code.

Statement of the Case

Appellant was charged, in a single count indictment, with the robbery of Graham Williams on December 20, 1965, in violation of Section 22-2901, D. C.

Code. The indictment recited that the property taken by appellant was of the value of about \$39.50, consisting of a wallet, billfold, wrist watch and \$12.00 in cash.

At the arraignment on February 25, 1966, appellant pleaded not guilty to the charge. He was on bond (Tr. 5, 6), until the trial on March 22, 1967 (Tr. 1, et. seq.). At the outset of the trial the Court denied a motion to dismiss for want of prosecution (Tr. 5).

Testimony on Behalf of The Government

Graham Williams was walking towards his home at about 10 p.m. on December 20, 1965. As he proceeded along Dent Place, he was jumped from behind. The attacker fell off his back and as Williams turned around, the attacker was opening the blade on a pocket knife and said he wanted William's money (Tr. 14). As the latter was getting the money from his billfold, two other persons came forward (Tr. 16), and one of them tried to grab the billfold (Tr. 17), which contained a ten dollar bill and 2 or 3 one dollar bills (Tr. 15, 16). The attacker put the knife against William's throat and he released his billfold (Tr. 18). The third member of the group, after attempting to restrain the one with the knife (Tr. 18), took a wrist watch from William's arm. After looking at it and making a comment on the make, he gave the watch back to William's (Tr. 18, 21). He also took William's wallet, looked at it and then gave it back. He took nothing from the wallet (Tr. 22, 23, 24).

Williams described the third member of the group as being lighter complexioned than the other two. He had a small brush mustache (Tr. 26, 27), and was wearing a three-quarter length corduroy coat (Tr. 26) which was of lighter color than the coats worn by the other two men (Tr. 26). Williams said the "third man looks like the gentleman who is the defendant" (Tr. 19).

The billfold, wallet and watch were returned to William's at the scene, but the attackers kept the money (Tr. 31, 32, 35). They then ran back toward 30th Street and at the corner of Dent and 30th, they turned east into Q Street (Tr. 24).

The incident took place about 15 yards from the corner where there was a street light on the same side of the street (Tr. 21, 22). There is another light on the other side of the street 25 or 30 yards away (Tr. 22).

Williams went from the scene to his apartment, about 150 yards away, and reported the incident to the police giving a description that the three involved were young men or late teen agers (Tr. 24) and indicated the direction in which they were heading (Tr. 25). He estimated that he called the police within two minutes after the incident occurred (Tr. 25, 26).

Officer Nedrow was on duty that evening on a Patrol Wagon. Shortly after 10 p.m., he received a radio report of a robbery that had taken place at 30th and Dent Place, Northwest. The description was for three young Negro males (Tr. 38, 39, 50). At about 10:15 (Tr. 53) Officer Nedrow saw the defendant and two other men walking east in the 2300 block of F Street (Tr. 39, 40) approximately nine blocks from 30th and Dent Place (Tr. 53). He stopped them and asked where they had been (Tr. 40). The defendant did not say anything to Officer Nedrow (Tr. 41), but Triplett, a juvenile, said they had walked a friend of theirs home. However, he could not give a specific address other than that it was on Q Street (Tr. 41). The officers recovered two knives from the three men when searched in front of complainant's address (Tr. 42). After the three men were arrested and taken to No. 7 Precinct, as the result of a further search, a ten dollar bill was found in the shoe of the other juvenile (Tr. 44), Niven (Tr. 45). A pen knife and two or three dollars were found on the defendant,

Martin (Tr. 53). Officer Nedrow recalled that at the time of arrest all three men were wearing fingertip coats (Tr. 49, 50).

Officer Nedrow testified that the knife identified as Exhibit 2 was taken from Triplett (Tr. 43). He said the blade of the knife does not come to a point, it is flat at the end (Tr. 43). Williams stated that when he was attacked, he noticed the point of the knife blade was broken off and the blade had a blunted edge (Tr. 16, 34). However, on cross examination, Williams said he could not be certain that the knife used against him was the same knife he identified at the trial (Tr. 35).

Testimony on Behalf of Defendant

The defendant took the stand in his own behalf (Tr. 57). He is 20 years of age (Tr. 58). On the evening of December 20, 1965, the defendant, Niven and Triplett had been with a fellow named Smith, who claimed he lived in Georgetown. They walked out there with him and when the four reached 30th and P Streets, he acted like he didn't know where he was going, so the three left Smith, reversed their direction and headed for home (Tr. 59, 60, 72). The defendant admitted that he, Triplett and Niven were arrested by Officer Nedrow at 23rd and P Streets (Tr. 59, 76, 77). They were stopped at ten o'clock because just prior thereto, the defendant had inquired as to the time and Triplett looked at his watch and said ten o'clock (Tr. 78). The defendant acknowledged that he was present when the ten dollar bill was found in Niven's shoe (Tr. 77). When arrested, the defendant had \$59.40 with him (Tr. 60), and was wearing a dark brown jacket that came down to his knees (Tr. 62, 63, 78).

The defendant was employed as a truck helper for Mazo-Lerch (Tr. 58, 59, 61), and had worked on December 20, 1965 (Tr. 62). He had been paid the previous Friday, (December 17th), his weekly take home pay was about \$49.75

(Tr. 63). Earlier in the evening on December 20th, he, Triplett and Niven had been gambling and the defendant won some money (Tr. 60, 67, 68).

The defendant testified that he did not rob or attempt to rob Graham Williams (Tr. 61).

Procedural Steps During and After Trial

At the close of the Government's case, the defendant moved for a judgment of acquittal (Tr. 55). The Trial Judge denied the motion (Tr. 56), after acknowledging that there were certain weaknesses since the victim of the robbery testified only that the defendant "looks like the third man" (Tr. 55).

The jury found the defendant guilty (Tr. 108), and the Court sentenced him to imprisonment for a term of not less than three years and four months and not more than ten years. The Court recommended, in view of defendant's age, that he be committed to a youth institution to serve his sentence (Tr. Sentencing - 6).

Statutes, Regulations and Rules Involved

D. C. Code, 1961 Edition, as amended —

"§ 22-2901. Robbery.

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years."

Federal Rules of Criminal Procedure —

Rule 29. Action For Judgment of Acquittal

"(a) Motion before submission to jury. * * * * *. The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. * * * * *".

Statement of Points

The single point is whether the Court below erred in denying appellant's motion for judgment of acquittal at the close of the Government's case, where it failed to positively identify appellant as a participant, and where the circumstantial evidence left doubt as to appellant's connection with the crime charged.

Summary of Argument

Appellant contends that the Government failed to make out a case sufficient to sustain the conviction in that he was not positively identified as a participant in the crime charged. While Williams, the complaining witness, gave a fairly complete description of the "third man" involved in the attack, he testified only that the "third man looks like the gentleman who is the defendant." In denying appellant's motion for a judgment of acquittal at the close of the Government's case, the Court acknowledged that the identification made by the complaining witness, if it stood alone, would not be sufficient. However, the Trial Judge observed that other circumstances were present which supported his ruling, such as (1) The arrest of three men shortly following the attack on Williams by three men, (2) the taking of a ten dollar bill from

Williams and the finding of a ten dollar bill in the shoe of one of the men after arrest, and (3) the fact that the end of the blade was broken on the knife used against Williams and on the knife found on one of the men after arrest.

Appellant contends that the similarities are of such a low order from the standpoint of proof that they do not fill the gap in the Government's case, left by the shortcomings in the identification. The Trial Judge noted that "the men arrested might have been three other men because I suppose there are many groups of three men walking the streets." The same comparison may be made of the other similarities in the circumstantial evidence, in that they might well have been the result of coincidence rather than by connection to the crime charged against appellant. In contrast, if the Hamilton watch belonging to Williams had been found on appellant at the time of his arrest, the connection of appellant to the crime would have been much more certain. It is submitted that the lack of positive identification and with the possibility existing of coincidence on the other circumstances, a doubt is created as to appellant's connection to the crime.

Appellant submits that his own testimony filled in a substantial gap in the Government's case by placing him, with the two juveniles, in the area of 30th and F Streets at about the time of the attack and with no plausible explanation as to why they were in that area or what they were doing there. In addition, appellant confirmed many of the circumstances with reference to the arrest by Officer Nedrow, which it is contended, were persuasive to the jury and aided in overcoming the defect in the Government's case as to lack of identification of appellant.

Finally, appellant contends that his motion for acquittal was erroneously denied, and that his testifying subsequently should not constitute a

waiver on his part. Rather, appellant concends that the doctrine of the Cephus case, infra, should be extended to eliminate the waiver as to him and that the review on appeal should be limited to the evidence at the close of the Government's case. In such circumstances, appellant submits that his conviction should be reversed.

REVIEW

The Court below erred in denying appellant's motion for judgment of acquittal at the close of the Government's case in view of its failure to sufficiently identify appellant as a participant, where the circumstantial evidence introduced left doubt as to appellant's connection with the crime.

In view of the lack of positive identification of appellant as a participant in the crime charged, he contends that the Government failed to make out a case sufficient to sustain a conviction. Accordingly, it was error for the lower Court to deny his motion for acquittal at the conclusion of the Government's case. In advancing such contention, appellant urges that the doctrine pronounced in Cephus v. United States (1963), 117 U. S. App. D. C. 15, 324 F. (2d) 393, be extended to cover his case, with no waiver resulting to appellant by reason of his having introduced evidence and with review limited on appeal to the evidence at the close of the government's case.

On the question of identification, the complaining witness described the third man as being lighter complexioned than the other two, with a brush mustache, and as wearing a three quarter length corduroy coat of lighter color than the coats worn by the other two men. From William's description of the men who attacked him, it appears that he had a good opportunity to observe them. While on some features of the identification William's testimony was certain and free from doubt yet he did not make a positive identification of the defendant. He testified only that the "third man looks like the gentleman who is the defendant."

The Trial Judge recognized this weakness when he ruled on defendant's motion for a judgment of acquittal at the close of the Government's case. The Court acknowledged that the identification made by Williams, if it stood alone, would not be sufficient. In resolving this issue into a question for the jury, the Court observed however, that other circumstances were present, such as (1) the arrest of three men shortly following the attack on Williams, (2) the taking from him of a ten dollar bill, and the finding of a ten dollar bill in the shoe of one of the men, after arrest, and (3), the fact that the end of the blade was broken, on the knife used against Williams and on the knife found on one of the men after arrest.

Appellant contends that the lower Court erred in denying defendant's motion for a judgment of acquittal. It is recognized that evidence as to surrounding circumstances may in a given case, tip the scales in favor of making the question one for jury determination, where identification of the accused is deficient. However, it is submitted that the circumstantial evidence involved here is so commonplace that it does not fill the gap in the case, left by the shortcomings in the identification. As the learned Trial Judge observed, in ruling on the motion, "the men arrested might have been three other men because I suppose there are many groups of three men walking the streets." Similarly, a comparison of the time of the incident and time of arrest, the taking of a ten dollar bill and the finding of such a bill on one of those arrested, and the circumstances pertaining to the broken or blunted edge of the knife blade, might well have resulted from coincidence rather than by connection to the crime charged against appellant. In contrast, for example, if the Hamilton watch belonging to Williams had been found on appellant at the time of his arrest, the connection of appellant to the crime charged would have been much more positive and certain. But such is not the case here, and

it is submitted that the circumstantial evidence introduced at the Trial leaves room for doubt.

In Lomax v United States (1964), 119 U. S. App. D. C. 371, 343 F. (2d) 240, this Court reversed a judgment of conviction where there was doubt as to whether the witness at the trial had in fact identified the defendant as a participant. It is true that in Lomax, there was a question of interpretation as to what the witness meant by what he said, which helped to create the doubt. In the instant case, the testimony of Williams was precise and positive on many of the details and circumstances surrounding the attack on him, but as to identification, he said only that the third man looks like the defendant. In further support of appellant's contention is the case of Cooper v United States (1954), 94 U. S. App. D. C. 343, 218 F. (2d) 39, wherein the judgment was reversed. It was noted that the Trial Judge must not allow the jury to speculate guilt without evidence. Then the Court went on to state —

"---Guilt, according to a basic principle in our jurisprudence, must be established beyond a reasonable doubt. And, unless that result is possible on the evidence, the judge must not let the jury act; he must not let it act on what would necessarily be only surmise and conjecture, without evidence." (Page 346).

Appellant submits that his own testimony filled in a substantial gap in the Government's case, resulting from the lack of positive identification by the complaining witness. Appellant placed himself, with Niven and Triplett, at 30th and P Streets at around ten o'clock on the evening in question, with no plausible explanation being given as to why they were in that area or what they were doing there. Moreover, appellant confirmed, through his testimony, many of the circumstances with reference to the arrest by Officer Nedrow. Such

confirmatory evidence on these features of the case, it is submitted, were persuasive to the jury, and served to overcome the defect in the Government's case, as to lack of identification of appellant.

Appellant contends that his motion for acquittal was erroneously denied, and that his testifying subsequently, should not constitute a waiver on his part. In such circumstances, it is submitted that review on appeal should be limited to the evidence at the close of the Government's case. Such contention, as already noted, involves extending the doctrine of Cephus, supra, to eliminate the waiver, formerly held applicable, where the defendant introduces evidence on his own behalf, after denial of his motion of acquittal at the conclusion of the Government's case. Appellant says that ample support for such extension is found in the case of State v Bacheller (1916), 89 N. J. L. 433, 98 A. 829, 830, wherein, it was stated, as follows:

" * * * the application of the civil rule to criminal trials is open to the criticism that, by force of a ruling that was wrong when made, testimony that the defendant ought not to have been required to give at all may be laid hold of to sustain the wrongful ruling by which he was required to give it. This comes perilously near compelling the accused to convict himself * * *,"

Further support for the extension of the holding in Cephus to appellant's case is set forth in the Motion for Acquittal: A Neglected Safeguard, 70 Yale L. J. 1151 (1961), wherein the author convincingly points out the fallacies in the waiver doctrine. It is said that "the waiver doctrine sanctions the use of defense evidence, evidence which would not have been presented but for the erroneous ruling, to support the defendant's conviction." The article also notes that —

the 19th century, the first major period of
immigration to the United States, was
marked by a massive influx of European
immigrants, primarily from Ireland, Germany,
and Great Britain. This period of mass
migration was driven by factors such as
political instability, economic hardship,
and religious persecution. The United States
offered a promise of opportunity and
a new beginning for many who were
unable to find it at home. The
immigrant experience was often
one of great difficulty and
challenges, but it also provided
a sense of community and
solidarity among those who shared
the same fate. The immigrant
experience has been a defining
part of American history and
culture, and its impact can still
be seen today in the diverse
population of the United States.

" In the criminal trial the efficacy of the defendant's motion for acquittal at the close of the prosecution's case is severely limited by the refusal of almost all appellate courts to review denial of the motion if the defendant later introduced evidence on his own behalf." (Page 1152). The author refers to the Bacheller case, supra, and to other authorities, saying that —

" ---Whether or not compulsion to testify under these circumstances-before the state has met its burden--technically contravenes the privilege against self-incrimination, it is certainly offensive to its spirit and to the fundamental precept that the prosecutor must prove his case by evidence 'independently secured.'" (Page 1161).

In light of the foregoing, it is submitted that because of the lack of positive identification of appellant, the Government failed to establish its case, and that the lower Court erred in denying appellant's motion for a judgment of acquittal. Finally, as required by Rule 29(a) of the Federal Rules of Criminal Procedure and by extension of the doctrine of the Cephus case, as herein urged, it is contended that the review on appeal should be limited to the evidence at the close of the Government's case, thus requiring reversal.

CONCLUSION

It is respectfully submitted that the conviction of appellant should be reversed.

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BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,087

MILTON MARTIN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

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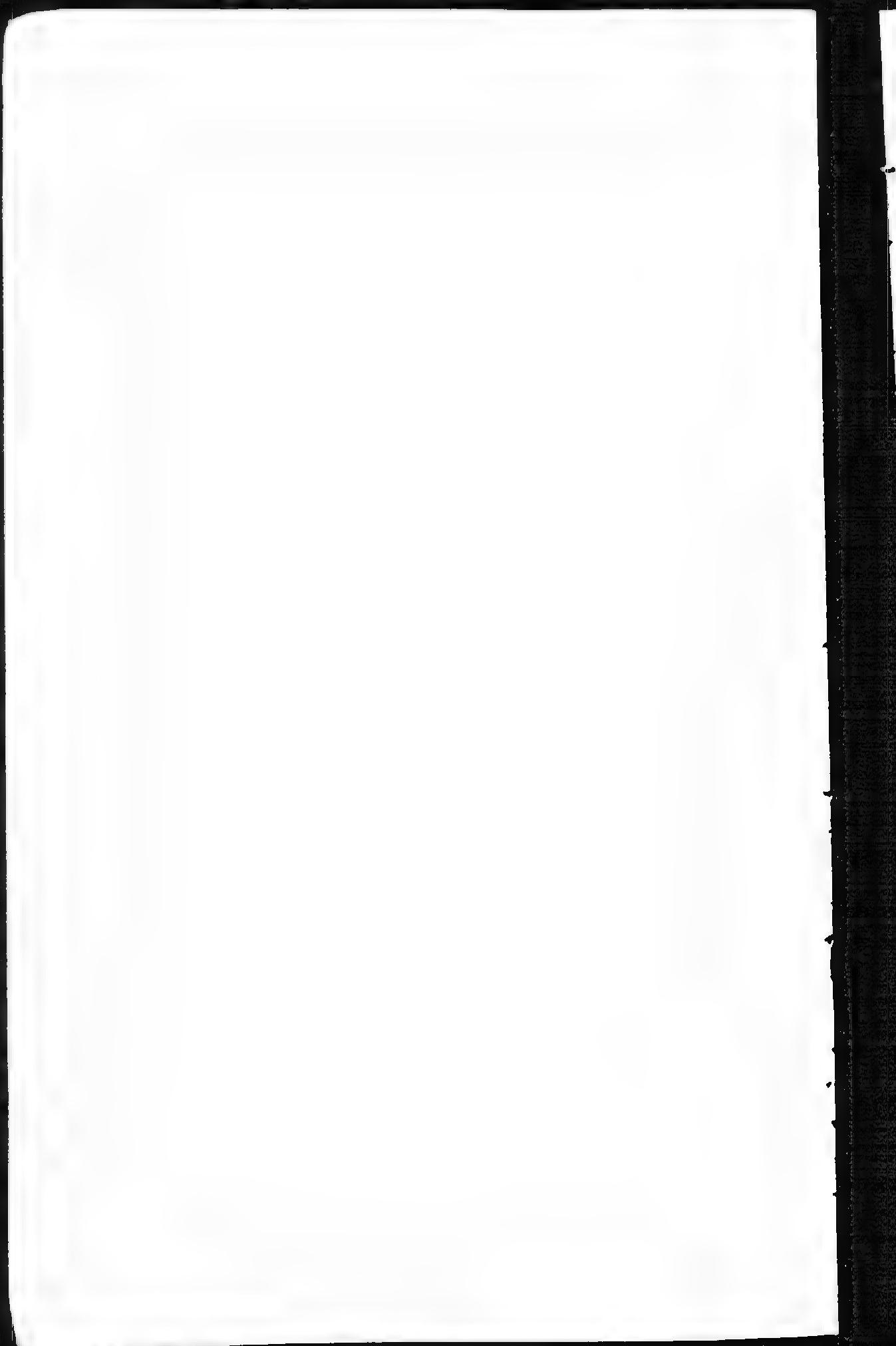
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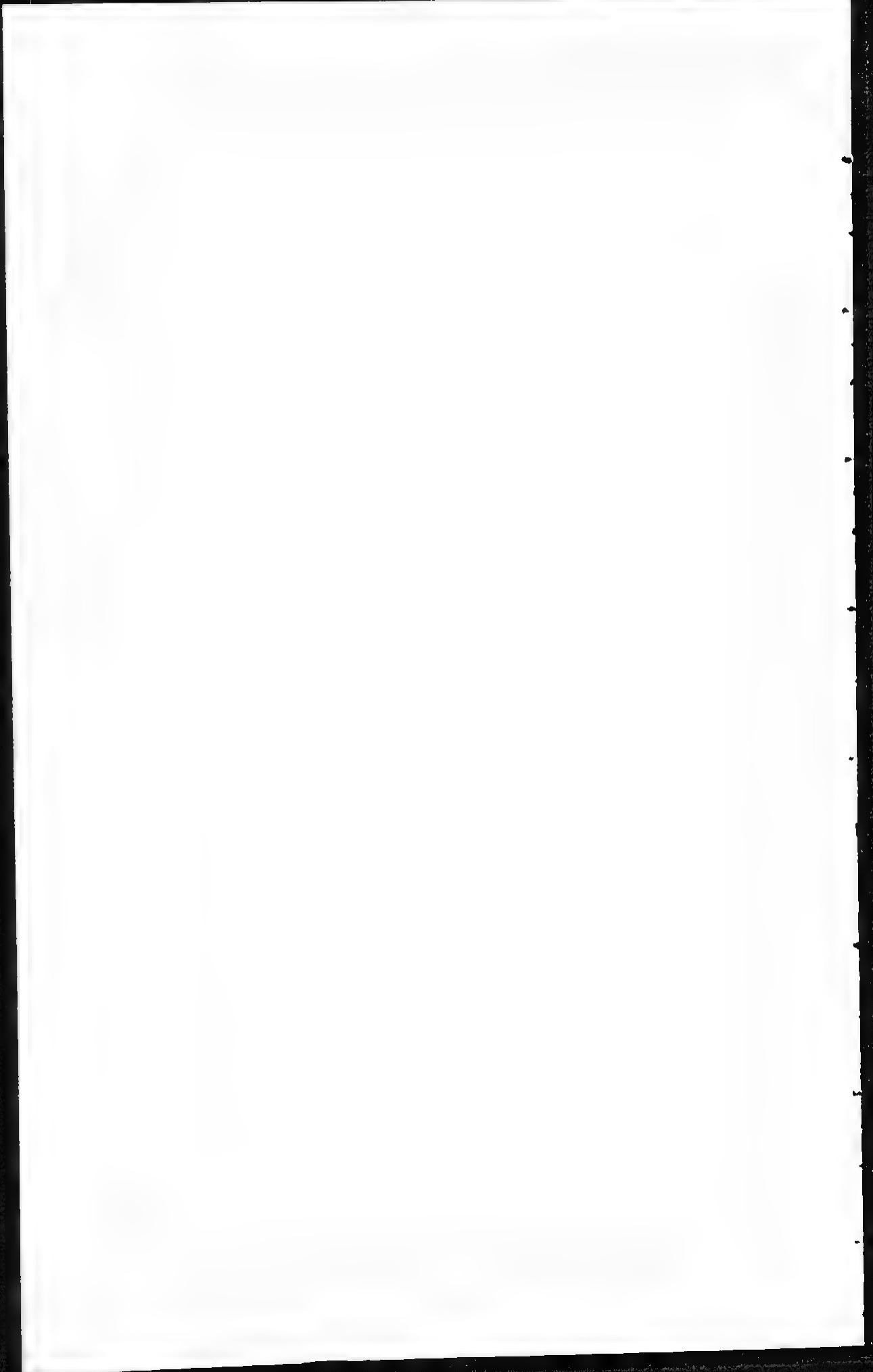


QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

(1) Whether the motion for judgment of acquittal at the end of the Government's case was properly denied in that the evidence introduced by the Government was such that reasonable men might or might not fairly have a reasonable doubt as to guilt?

(2) Whether after appellant introduced evidence following the denial of the motion for judgment of acquittal, the review for sufficiency of the evidence should be confined to the Government's case in chief?



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— Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,087

MILTON MARTIN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In accordance with Rule 17(c) (3) of this Court, and except as noted below, we accept the facts set forth by the appellant, but will, where pertinent, amplify them as they relate to the argument.

The complainant testified that the blade of the knife was placed against his wrist when his wristwatch was removed and he thus had an opportunity to feel the end of the blade and decided that it was not very sharp (Tr. 18, 34). The wristwatch had the tradename Hamilton upon it and the third person referred to it as a cheap Hamilton (Tr. 21). The complainant's attention was focused at one time upon the contents of his billfold

because he attempted to extract the currency in order to retain possession of his billfold (Tr. 16, 17, 35). The complainant also testified that his description to the police was that of three Negro young men or late teenagers (Tr. 24-25). Officer Nedrow testified that he received the radio report of the incident shortly after ten "at about 10:10 p.m." (Tr. 39, 50), and that appellant and the two juveniles were spotted about 10:10 or 10:15 p.m. walking briskly eastward on the P Street Bridge (Tr. 40, 53). The knife recovered and placed into evidence was a pocket knife (Tr. 43).

STATUTE AND RULE INVOLVED

Title 22, District of Columbia Code, Section 2901, provides:

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Rule 29, Federal Rules of Criminal Procedure, Motion for Judgment of Acquittal, provides:

"(a) Motion before submission to jury.

. . . The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses . . ."

SUMMARY OF ARGUMENT

I

The trial court must deny a motion for judgment of acquittal when the evidence against defendant viewed

most favorably to the Government's position is such that reasonable men might or might not find guilt beyond a reasonable doubt. The complainant was held up by three men who threatened him with the blunt-ended blade of a pocket knife and took a single ten-dollar bill and several one-dollar bills from him. Three men were apprehended a few minutes afterward by the police in a place consistent in time, distance, and direction with the escape from the scene. One of the men had a pocket knife with a blunt-ended blade which the complainant testified resembled the blade used to threaten him. Another of the trio had a single ten-dollar bill concealed in his shoe. The third was appellant. The complainant identified appellant as one of the three men who held him up. There was sufficient evidence of appellant's identification to withstand the motion.

II

When a defendant testifies after denial of a motion for judgment of acquittal, then the evidence as a whole must be reviewed for sufficiency to support the verdict. Since appellant has conceded that the evidence as a whole was capable of supporting the verdict, the judgment of conviction should be affirmed even if an infirmity existed in the Government's case.

ARGUMENT

- I. From the evidence introduced by the Government reasonable men might or might not fairly find guilt beyond a reasonable doubt.

(Tr. 14, 16-19, 21-22, 24-27, 39-40, 43-45, 49-50, 53)

On a motion for judgment of acquittal, the trial court and this Court must view the evidence in the light most favorable to the Government's position in order to determine whether reasonable persons might or might not find guilt beyond a reasonable doubt. *Crawford v. United*

States, — U.S. App. D.C. ——, 373 F.2d 332, 334, 1967; *Curley v. United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, cert. denied, 331 U.S. 837 (1947). The Government contends that, under the evidence at the close of its case in chief and disregarding the testimony after the motion, reasonable men might or might not have a reasonable doubt as to guilt. Hence the trial court was correct in denying the motion. *Crawford v. United States*, *supra*.

At the time of the motion by appellant the Government had put in a substantial case in chief. The complainant testified that at about ten p.m. on December 20, 1955, he was accosted by three young Negro men (Tr. 14, 16-18). One of them demanded his money and opened the blade of a pocket knife (Tr. 14). The complainant testified that the blade looked like the point was broken off and had a blunted edge (Tr. 16-17), and that the tip did not feel very sharp when placed against his wrist (Tr. 34). A second man of the trio took a single ten-dollar bill and several one-dollar bills from the complainant's billfold while the first held the blade against the complainant's throat (Tr. 16-18). Then the first man held the blade against the complainant's wrist while the third man stepped up, took the complainant's wristwatch, examined it, and returned it with the remark that it was a cheap Hamilton (Tr. 18). The third man then took the complainant's wallet, examined it, and returned it (Tr. 22). The complainant further testified that the nearness of the three and the lighting conditions enabled him to get a good look at them (Tr. 21-22). As the robbers fled, they were last seen by the complainant running east on Q Street from 30th Street (Tr. 24). The complainant notified the police from his nearby apartment within two minutes of the robbery about the incident, the robbers' direction of flight, and their description (Tr. 24-26).

Officer Nedrow testified that shortly after 10 p.m. or "about 10:10" he received a radio report of the robbery,

including the description (Tr. 39-40, 50). A few minutes later at about 10:10 or 10:15, Officer Nedrow apprehended three young Negro men all wearing fingertip coats, who were walking briskly eastward on the P Street Bridge about nine blocks east of the scene of the robbery (Tr. 39-40, 49-50, 53). Officer Nedrow testified that one of the men had a pocket knife with a flat-ended blade, a second had a single ten-dollar bill concealed in his shoe, and the third was identified by him in the courtroom as the present appellant (Tr. 39, 43-45, 49). The complainant testified that the blade of the pocket knife recovered resembled the blade of the pocket knife with which he had been threatened (Tr. 17).

The complainant testified as to appellant's identification that "the third man looks like the gentleman who is the defendant," and pointed appellant out in the courtroom (Tr. 19). As previously noted, the complainant had ample opportunity to observe the men (Tr. 21-22). The complainant further testified that at the time of the robbery he had observed that the third man wore a three-quarter length coat of a maple color which was of lighter color than the coats of the other two; also that the third man was of lighter complexion than the other two. Moreover, the complainant stated that the third person had a very small brush moustache like the one appellant had at trial. (Tr. 26-27).

Appellant asserts that this was not "positive" because the complainant used the phrase "looks like" (Appellant's Brief p. 8).¹ But there is no formula for identification.

¹ The trial court's comment on the identification by complainant is clarified when viewed against his standard that "an identification standing alone can easily be mistaken, unless the identifying witness previously knew the person who he is identifying" (Tr. 38). Also bearing upon the credibility of the witness and the relative importance of the precise words of identification is the following colloquy:

"DEFENSE COUNSEL: If I recall the witness' prior answer, he did not identify the defendant as the man who took the watch. The last question posed by Mr. Collins referred to

People v. Spellings, 141 Cal. App. 2d 457, 296 P.2d 889 (1956) ("looked like"); *People v. Richardson*, 81 Cal. App. 2d 886, 185 P.2d 47 (1947) ("resemble"). And the complainant's testimony has none of the weaknesses of identification testimony which has supported other verdicts. *Glover v. United States*, 110 U.S. App. D.C. 99-100, 289 F.2d 765-766 (1961) (impeachment by prior inconsistent statements); *United States v. DeSisto*, 329 F.2d 929, 934 (2d Cir. 1964) (witness had doubt about own testimony; see generally, 23 C.J.S. *Criminal Law* § 920, pp. 645-647 (1961)). More importantly, the force of the complainant's identification of appellant depended upon the impression the jury got of the complainant's powers of observation, his opportunity to observe, and his demeanor at trial. These are questions of the weight of the evidence and the credibility of the witness, matters which are reserved for resolution by the jury.³ *Glasser v. United States*, 315

the defendant as the man who took the watch. I may be mistaken.

THE COURT: I am afraid you are because I understood the testimony to be that the defendant looks like the man who took the watch. I think those were the words that the witness used." Tr. 20.

³ Appellant asserts that his own testimony "filled in a substantial gap in the Government's case" by placing him and two other men at 30th and P. at about the time of the attack with no "plausible explanation" of their presence there (Appellant's Brief p. 7). No such "gap" existed in the Government's case, because there was direct testimony by the complainant which placed appellant at the scene of the robbery, 30th and D. St., rather than merely at 30th and P. This is a question of the credibility of the complainant's testimony which, in fact, was corroborated by the circumstances of the arrest. The failure of appellant to render a "plausible explanation" of his presence at 30th and P. is simply a failure of rebuttal. Appellant also asserts that his testimony confirmed many of the circumstances with reference to the arrest by Officer Nedrow (Appellant's Brief p. 7). Whether the testimony of Officer Nedrow needed confirmation involves an evaluation of his credibility as a witness; again this is the province of the jury. It is evident that appellant's attack is really directed at the credibility of the Government's witnesses rather than to an omission in proof by the case in chief.

U.S. 60, 80 (1942); *Thompson v. United States*, 88 U.S. App. D.C. 235, 236, 188 F.2d 652, 653 (1951).

Furthermore, the Government's case includes more than the identification of appellant by the complainant. The circumstances of the speedy apprehension of appellant and the two others is consistent in time, distance, and direction with the escape from the scene. The blunted blade of the pocket knife and the concealed ten-dollar bill also tie in with the complainant's testimony. Rather than a cumulation of coincidences, the evidence prevents a consistent picture of events.

The Government's evidence was substantial. When viewed in the light most favorable to the Government's position, *Curley v. United States*, *supra*, and giving due regard to the jury's function to weigh evidence and determine the credibility of witnesses, *Glasser v. United States*, *supra* at 80, the evidence was such that reasonable jurymen might or might not find guilt beyond a reasonable doubt. *Crawford v. United States*, *supra*, 375 F.2d at 334. The trial court was correct in denying the motion.

II. When appellant has introduced testimony after the denial of the motion for judgment of acquittal, review for sufficiency of the evidence must be on the record as a whole.

The Government contends that the evidence in its case in chief supported the denial of the motion for judgment of acquittal. Appellant concedes that by including the testimony introduced subsequent to the motion, the evidence is sufficient to support the jury verdict (Appellant's Brief p. 7). By offering testimony after denial of the motion, though, appellant waived his challenge to the Government's *prima facie* case and the appeal comes up on the record as a whole. *Hall v. United States*, 88 U.S. App. D.C. 166, 169, 168 F.2d 161, 164, cert. denied, 334 U.S. 853 (1948); *Ladrey v. United States*, 81 U.S. App. D.C. 127, 130, 155 F.2d 417, 420, cert. denied, 329

U.S. 723 (1946); *Murray v. United States*, 53 U.S. App. D.C. 119, 126, 288 Fed. 1008, 1115 (1923). Thus even though an infirmity should exist in the Government's case, the judgment should be affirmed on the record as a whole.

Appellant seeks to avoid this result by requesting the overthrow of the waiver rule by an extension of the holding in *Cephus v. United States*, 117 U.S. App. D.C. 15, 324 F.2d 893 (1963). *Cephus* dealt with the situation where the defendant offered testimony to rebut the inculpatory evidence of a co-defendant and this Court there merely declined to make an "extension of this waiver doctrine to apply it to the circumstances of this case." 117 U.S. App. D.C. at 17, 324 F.2d at 895. More recently in *Austin v. United States*, D.C. Cir. No. 19,903, decided June 16, 1967, this Court restricted its review for sufficiency of evidence to the Government's case in chief. In doing so, this Court noted that it avoided several knotty defense contentions, including an assertion that appellant in that case was entitled to separate trials on the commission of the offenses and on the issue of mental competency under *Holmes v. United States*, 124 U.S. App. D.C. 152, 363 F.2d 281 (1966).

In neither *Cephus* nor *Austin* can it fairly be said that the defendant waived his objection to the sufficiency of the Government's case. In *Cephus* the defendant was forced to rebut the inculpatory evidence of a co-defendant. In *Austin* the defendant introduced evidence to meet the burden of raising the issue of insanity because, although the Government has the burden of proof on that issue, a presumption of sanity of the defendant attaches unless there is evidence to place it into issue. *Tatum v. United States*, 88 U.S. App. D.C. 386, 389, 190 F.2d 612, 615 (1951).

Apart from those special situations, the waiver rule in general has been criticized as an unanalyzed transfer of a rule from the civil into the criminal side without taking into account that the accusatorial process of criminal justice differs from civil litigation. Yet there is no

inherent hostility between civil procedure and criminal procedure as they relate to orderly judicial administration. *Cf. United States v. Healy*, 376 U.S. 75, 77-80 (1964). Also, the accusatorial process must be considered in the context of the adversary system of our jurisprudence. An analogous situation is that of the privilege against self-incrimination and its waiver at trial. The privilege is a fundamental element of the accusatorial process, but, if the defendant takes the stand, then he is subject to the rules of cross-examination as is any other witness. *Johnson v. United States*, 318 U.S. 189 (1943).

A defendant can stand on his motion and let the case go to the jury on the Government's evidence alone and still preserve the question for appellate review if the jury returns a verdict against him. Such tactical decisions are a part of the adversary system and who can say that it is any more difficult to decide that question than to decide to waive the privilege against self-incrimination and become subject to cross-examination. In another context, the Supreme Court commented on the distinction between a waiver of inadvertence and a course of action at trial: "We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected be reopened to him." *Johnson v. United States*, *supra*, 318 U.S. at 189.

Furthermore, appellate courts have been reluctant to reverse a conviction on the sufficiency of the evidence where the trial court has ruled that the Government made out a *prima facie* case, a jury has returned a verdict against the defendant, and the record considered as a whole supports the conviction. The waiver rule has widespread acceptance in most of the circuit courts of appeal,³ and the Supreme Court apparently has approved

³ *Gaunt v. United States*, 184 F.2d 284 (1st Cir. 1950), cert. denied, 340 U.S. 917, rehearing denied, 340 U.S. 939 (1951);

this rule. *United States v. Calderon*, 348 U.S. 160, 164 & n.1 (1954); see also *Petrovich v. United States*, 205 U.S. 86, 91 (1907) (dictum).

The Government's primary contention is that the evidence in its case in chief was sufficient to go to the jury. But even should an infirmity exist in that proof, there is no dispute that the total evidence supports the jury verdict, and thus the judgment should be affirmed since the subsequent testimony of appellant waived his objection to the *prima facie* case.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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United States v. Goldstein, 168 F.2d 666 (2d Cir. 1948); *T'Kach v. United States*, 242 F.2d 937 (5th Cir. 1957); *United States v. Gosser*, 329 F.2d 102 (6th Cir. 1964), cert. denied, 382 U.S. 819, rehearing denied, 382 U.S. 922 (1965); *United States v. Amann*, 210 F.2d 344 (7th Cir. 1954); *Jahen v. United States*, 349 F.2d 913 (8th Cir. 1965); *Benchwick v. United States*, 297 F.2d 330 (9th Cir. 1961); *Hughes v. United States*, 320 F.2d 459 (10th Cir. 1963), cert. denied, 375 U.S. 966 (1964).

